

No. 7:18-CV-116-FL

Defendant.

ORDER

In reviewing objections to the M&R, “shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1). The court does not perform a de novo review where a party makes only “general and conclusory objections that do not direct the court to a specific error in the magistrate’s proposed findings and recommendations.” Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). Absent a specific and timely filed objection, the court reviews only for “clear error,” and need not give any explanation for adopting the M&R. Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005); Camby v. Davis, 718 F.2d 198, 200 (4th Cir. 1983). Upon careful review of

the record, “the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1).


Here, the magistrate judge determined that the ALJ erred in failing to address evidence bearing on Listing 1.04, and in failing to explain her determination that plaintiff could sit for up to six hours each day, despite their being evidence to the contrary. Defendant raises only a general objection to these grounds for remand. Upon careful review of the M&R and the record generally, finding no clear error in the magistrate judge’s determination, the court adopts the recommendation of the magistrate judge to remand to defendant for further proceedings on the basis of these grounds identified in the M&R.

The magistrate judge also determined that remand is required because the ALJ was not appointed in compliance with the requirements of the Appointments Clause of the United States Constitution, pursuant to Lucia v. SEC, 138 S.Ct. 2044 (2018). Defendant raises a specific objection to this determination, arguing that this issue was not timely raised by plaintiff during administrative proceedings, noting that this issue is being presented in an appeal pending before the United States Court of Appeals for the Fourth Circuit, and that this basis for remand is contrary to the majority of district court decisions that have considered the issue. Where the issue raised is pending before the Fourth Circuit, and where it is not the only basis for remand asserted here, the court adheres to its prior determinations that Lucia does not provide a basis for remand where not timely raised during administrative proceedings. See, e.g., Graham v. Berryhill, No. 7:18-CV-22-FL, 2019 WL 1270933 (E.D.N.C. Jan. 10, 2019), report and recommendation adopted by 2019 WL 1270933 (E.D.N.C. Mar. 19, 2019); Higgs v. Berryhill, No. 4:18-CV-22-FL, 2019 WL 848730 (E.D.N.C. Jan. 10, 2019), report and recommendation adopted by 2019 WL 845406 (E.D.N.C. Feb. 21, 2019).

## CONCLUSION

Based on the foregoing, upon careful review of the M&R, the court ADOPTS IN PART and REJECTS IN PART the M&R. The court GRANTS plaintiff's motion for judgment on the pleadings (DE 13), DENIES defendant's motion for judgment on the pleadings (DE 16), and REMANDS this matter to defendant pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with the foregoing. The court REJECTS the recommendation of the magistrate judge to remand to a different ALJ pursuant to Lucia. The clerk is DIRECTED to close this case.

SO ORDERED this the 20th day of September, 2019.

  
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LOUISE W. FLANAGAN  
United States District Judge